Supreme Court, U.S.
FILED

No. 061332

MAR 2 9 2007
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In the Supreme Court of the United States

STEPHEN GILL and MICHELLE GILL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Addressing a conflict among the Courts of Appeals,

a) is a claim for emotional distress without physical injury outside the scope of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*; and

b) do federal courts have jurisdiction to decide this question?

RULE 14.1(b) STATEMENT
LIST OF ALL PARTIES

The caption of the case in this court contains the names of all parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Stephen and Michelle Gill respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the First Circuit, dated December 1, 2006, is officially reported at 471 F.3d 204, and is reproduced at App. 1a-10a.

The Memorandum and Order of the U.S. District Court for the District of Massachusetts, dated January 9, 2006, is unreported and is reproduced at App. 11a-12a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the First Circuit sought to be reviewed was entered on December 1, 2006. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and 13.5 because it is being filed within the time allowed by Justice Souter on February 9, 2007 (Application No. 06A779).

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. § 1331 and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346 *et seq.*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The **Federal Tort Claims Act,** 28 U.S.C. §§ 1346 *et seq.*, provides, in pertinent part:

> **28 U.S.C. § 1346**
> **United States as Defendant**
>
> . . .
>
> (b)(1) . . .[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The **Federal Employees' Compensation Act** (FECA), 5 U.S.C. § 8101 *et seq.*, provides, in pertinent part:

> **5 U.S.C. § 8102** provides in pertinent part:
> **Compensation for disability or death of employee**
> **(a)** The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . . .
>
> **5 U.S.C. § 8101(5)** provides:
> **Definitions**
> For purposes of this subchapter–
>
> . . .

(5) "injury" includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services.

5 U.S.C. § 8116(c) provides:
Limitations on right to receive compensation

. . .

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute.

5 U.S.C. § 8124(a) provides:
Findings and award; hearings
(a) The Secretary of Labor shall determine and make a finding of facts and make an award for or against payment of compensation under this subchapter after--
(1) considering the claim presented by the beneficiary

and the report furnished by the immediate superior; and
(2) completing such investigation as he considers necessary.

5 U.S.C. § 8128 provides in pertinent part:
Review of award
(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may--
(1) end, decrease, or increase the compensation previously awarded; or
(2) award compensation previously refused or discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--
(1) final and conclusive for all purposes and with respect to all questions of law and fact; and
(2) not subject to review by another official of the United States or by a court by mandamus or otherwise. . . .

5 U.S.C. § 8145 provides in pertinent part:
Administration
The Secretary of Labor shall administer, and decide all questions arising under, this subchapter . . . .

STATEMENT OF THE CASE

This action arises out of Stephen Gill's complaint for negligent and intentional infliction of emotional distress filed under the Federal Tort Claims Act (FTCA) against employees

of the Naval Legal Services Command and the Naval Legal Services Office Central (hereafter, collectively, "NLSO"). His wife, Michelle Gill, sought damages for loss of consortium, marital society, and service.

In his complaint, Mr. Gill asserted that employees of NLSO recruited and hired him in 2002 to provide legal services for a two-year period as a Claims Attorney-Advisor in its office in Pensacola, Florida. Mr. Gill resigned from his law practice in Boston, Massachusetts, sold his family's home, relocated his wife and two young children to Florida, and began work for NLSO on March 25, 2002. Within forty-five days, NLSO employees notified him that his position would conclude on June 30th, after he had worked only ninety days. In mid-June, NLSO announced that his position would instead end on September 30th. In mid-September, when Mr. Gill had secured new employment in a private law firm in Pensacola, NLSO again changed his termination date, this time to October 31st. In late October, NLSO once more shifted tack and hired Mr. Gill as a Legal Assistance Attorney-Advisor for a six-month period, causing him to turn down the private practice position. Less than two months later, at Christmas, 2002, NLSO informed him that his job would end on January 11, 2003, which was in fact the last day he worked for NLSO as a civilian attorney. At all times NLSO was entirely satisfied with Mr. Gill's job performance.

This conduct by NLSO employees--hiring Mr. Gill for a two-year term, repeatedly changing this term after he relocated from Boston to Florida, and then terminating his position after only nine months--caused Mr. Gill severe emotional distress. His symptoms, he asserted, included stress, anxiety, fatigue, sleeplessness, feelings of despair,

concentration problems, difficulty in driving and working, and reduced libido.[1]

The government moved to dismiss the complaint, arguing that Mr. Gill was required to submit his claims to the Secretary of Labor pursuant to Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8152, *et seq.* (FECA) before filing suit under the FTCA. In his opposition, Mr. Gill maintained that his claim for emotional distress without physical injury is not compensable under the FECA and cited the conflict among the courts of appeals on this legal issue.

The District Court ruled that it lacked subject matter jurisdiction and dismissed Mr. Gill's case without prejudice to being reinstituted should the Secretary of Labor decide that the FECA does not cover the Gills' claims. App. 11a-12a.

The First Circuit affirmed, ruling that a federal employee[2] who brings a tort claim against the United States for work-related injuries "must first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under [FECA]" and that "a substantial question exists unless it is certain that the Secretary would not find coverage." App. 6a-8a, citing *Bruni v. United States*, 964 F.2d 76, 79 (1st Cir. 1992). It was far

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[1] These pleadings established the torts of negligent infliction of emotional distress and intentional infliction of emotional distress under Massachusetts law. *Gutierrez v. Massachusetts Transit Bay Authority*, 437 Mass. 396, 412-413, 772 N.E.2d 552, 566-567 (2002); *Simon v. Solomon*, 385 Mass. 91, 95, 431 N.E.2d. 556, 561 (1982).

[2] The First Circuit mistakenly asserts that Mr. Gill did not raise his status as independent contractor in the district court. App. 8a n.6. The record shows that he did raise this issue.

from certain, the court ruled, that the Secretary would deny coverage to Mr. Gill, because the official responsible for administering FECA had attested that, if the facts in his complaint were true, there was "a significant possibility" of FECA coverage and because the Secretary of Labor has "construed FECA to encompass work-related emotional distress, without regard to physical injury." App. 8a-10a.

Under these circumstances, the First Circuit held that federal courts lack jurisdiction to decide whether, properly construed, the FECA's definition of compensable "injury" does not cover stand-alone emotional distress. App. 9a-10a. As shown below, the Tenth Circuit has the same rule.

REASONS FOR GRANTING THE PETITION

Because of a conflict among the Courts of Appeals, a federal employee may sue the government for work-related emotional distress unrelated to physical injury in the Ninth Circuit, but not in the First or Tenth Circuits, without first submitting a FECA claim to the Secretary. In short, there is jurisdiction in the Ninth Circuit but not in the First and Tenth Circuits over an otherwise identical claim.

The First Circuit's decision here, as well as decisions of the Tenth Circuit, conflict with Ninth Circuit decisions holding that (a) federal courts have subject matter jurisdiction to decide whether the FECA provides the exclusive remedy for stand-alone emotional distress, i.e., to rule on the jurisdictional question of "scope of coverage," and (b) a federal employee's claim for emotional distress, when divorced from any claim of physical harm, is outside the scope of the FECA and need not be brought to the Secretary of Labor. *Moe v. United States*, 326 F.3d 1065, 1068-1069 (9th Cir. 2003); *Sheehan v. United States*, 896 F.2d 1168,

1173-1174, *amended on other grounds*, 917 F.2d 424 (9th Cir. 1990).

The First Circuit's decision also conflicts with a decision of this Court holding that the original meaning of a statutory definition controls where, as here, Congress has not changed that definition. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781-783 and n.12 (2000). In 1916, when Congress first enacted the FECA to compensate federal employees for work-related "personal injury," and in 1924, when it enacted the first definition of "injury" compensable by the FECA, the common law did not permit damages for emotional distress with no corresponding physical injury. Because Congress has never changed the 1924 definition of personal "injury," that original definition should be held to control here.

This Court should grant certiorari to resolve these conflicts among the Courts of Appeals on these important questions of federal jurisdiction and statutory construction.

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THE NINTH CIRCUIT'S DECISIONS EXERCISING FEDERAL JURISDICTION TO RULE ON THE SCOPE OF THE FECA, A FEDERAL STATUTE, AND CONSTRUING THE FECA AS NOT PROVIDING A REMEDY FOR EMOTIONAL DISTRESS WITHOUT PHYSICAL INJURY.

The Gills' complaint against NLSO sounded in tort under the FTCA, which "was designed primarily to . . . to render the Government liable in tort as a private individual would be under like circumstances." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004), quoting *Richards v. United States*, 369 U.S. 1, 6 (1962); 28 U.S.C. § 2674. Seeking damages under

the FTCA for a federal employee's work-related emotional distress was facially proper. The FTCA allows compensation for *any* "injury," 28 U.S.C. § 1346, and nowhere bars recovery by a federal employee. 1 L. Jayson and R. Longstreth, HANDLING FEDERAL TORT CLAIMS § 5.04[1], pp. 5-18-19 (2006).

As the government urged that provisions of the FECA divested the district court of this primary jurisdiction over the Gills' claims, the First Circuit was required to construe these provisions "both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995), quoting *Cheng Fan Kwok v. I.N.S.*,392 U.S. 206, 212 (1968).

The First Circuit instead engaged in no analysis of the FECA at all. It evaded the question of statutory interpretation by quoting provisions of the FECA and omitting the key language on which the Gills relied. Specifically, the First Circuit noted that "[l]iability under FECA is 'exclusive and instead of all other liability of the United States . . . to the employee,'" as if that were the end of the matter. It omitted, however, the critical clause in this sentence, which limits the FECA's exclusivity to "liability . . . with respect to the injury or death of an employee." 5 U.S.C. § 8116(c).

Petitioners' case not only required close attention to this limiting clause, but also to other language limiting payment to compensation for "disability or death resulting from personal injury," 5 U.S.C. § 8102(a), and to the explicit

language and historical context[3] of the statutory definition of "injury":

> "[I]njury" includes, in addition to injury by accident, a disease proximately caused by the employment, and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services . . . .

5 U.S.C. § 8101(5).

By established Ninth Circuit precedent, in direct conflict with the First Circuit's decision in the case at bar, App. 6a-10a, federal courts have jurisdiction to decide the scope of this definition of personal "injury" and thus to decide the scope of FECA's coverage. *Sheehan v. United States*, 896 F.2d 1168, 1173-1174, *amended in* 917 F.2d 424 (9th Cir. 1990).

After finding jurisdiction, the Ninth Circuit decided the substantive issue here, ruling that a FECA claim "must result from physical injury" and thus that "emotional injury, 'divorced from any claim of physical harm,' is outside FECA's scope." *Moe v. United States*, 326 F.3d 1065, 1068 (9th Cir. 2003), citing *Sheehan*, *supra*.

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[3] This historical context is discussed in Section II, *infra*.

The seminal case in the development of this Ninth Circuit precedent is *Guidry v. Durkin*, 834 F.2d 1465 (9th Cir. 1987), where the Court ruled that a federal employee's claim for work-related defamation is not covered by the FECA:

> [W]hile the FECA was and is intended to provide an exclusive remedy for all employees of the United States suffering job-related injuries, [citation omitted,] the very nature of the FECA as a workers' compensation statute bars recovery for anything other than injuries (resulting in some form of physical disability) or death. *See, e.g.*, 5 U.S.C. §§ 8101(5) (defining "injury" as physical harm) and 8102(a)(1) (mandating "disability" or "death" as grounds for recovery).

Id., 834 F.2d at 1471-1472, citing *Newman v. Legal Services Corp.*, 628 F.Supp. 535, 543 (D.D.C. 1986) (emotional distress is not an "injury" under the FECA).

The Ninth Circuit soon applied this reasoning to a federal employee's claim for "emotional distress divorced from any claim of physical harm" in *Sheehan v. United States*, 896 F.2d 1168, 1174, *amended in* 917 F.2d 424 (9th Cir. 1990). Because the FECA only provides compensation for physical harm, the Court ruled, the District Court erred in dismissing the plaintiff's stand-alone emotional distress claim filed under the FTCA. *Id.* at 1173-1174.

Sheehan remains the law of the Ninth Circuit.

In two subsequent cases where, unlike here, the plaintiffs' claims for emotional distress were *not* "divorced from any claim of physical harm," the Ninth Circuit held that they had to submit their claims to the Secretary of Labor under the

FECA. *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993) (emotional distress secondary to physical injury suffered from work-related exposure to toxic PCB's); *Moe v. United States*, 326 F.3d 1065, 1067-1069 (9th Cir. 2003) (physical injury secondary to emotional distress suffered from work-related shooting incident).

In contrast, the Ninth Circuit reaffirmed in *Moe* that federal courts retain jurisdiction over a claim for emotional injury which is "divorced from any claim of physical harm." Such claims are, as a matter of law, "outside the scope of the FECA." *Id.* at 1068.

In the case at bar, the First Circuit opined that this Ninth Circuit precedent is "inconsistent with . . . the statutory assignment of these questions to the Secretary," apparently referring to the provision in 5 U.S.C. § 8145 that the Secretary "shall administer and decide *all questions* arising under [FECA]." App. 4a, emphasis in original.

This section of the statute, however, is not helpful to the analysis, because by its terms it only applies to those "questions" which "arise under" the FECA. The need for this preliminary ruling, in appropriate cases, implicates the fundamental power of the federal district courts, on whom Congress bestowed "original jurisdiction of all civil actions arising under the . . . laws of the United States," 28 U.S.C. § 1331, and particularly of all civil actions arising under the FTCA, 28 U.S.C. 1346. See, *Jones v. R.R. Donnelly and Sons Co.*, 541 U.S. 369, 376 and n.6 (2004) (citing cases on meaning of "arising under" in jurisdictional statutes). Accordingly, the power to decide whether a particular question "arises under" the FECA statute (and is thus reserved to the Secretary of Labor) or whether it "arises under" the FTCA (and is thus reserved to the federal courts)

is necessarily within the district courts' broad subject matter jurisdiction. In this case, the First Circuit's view of this "arising under" clause in the FECA gives alarmingly short shrift to its power to determine its own jurisdiction.

The First Circuit also rejected the Ninth Circuit's view on the merits--that FECA "injury" does not include stand-alone emotional distress--as "contrary to the great weight of authority." App. 8a-9a, n.7. But the weight of authority is not quite as heavy as the First Circuit suggests. Until the First Circuit's decision in the present case, only the Tenth Circuit had squarely held that every work-related claim for stand-alone emotional distress "presents a substantial question of FECA coverage" and must be submitted to the Secretary. *Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) (noting contrary Ninth Circuit precedent). The remaining appellate cases skirt the issue in a variety of ways,[4]

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[4] *Spinelli v. Goss*, 446 F.3d 159 (D.C. Cir. 2006), solely turned on the fact that the Secretary had already granted the plaintiff FECA benefits for emotional distress. Dismissal was thus required under *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991), noting the unambiguous language of the FECA barring judicial review of the Secretary's "action . . . in allowing or denying a payment under this subchapter." 5 U.S.C. § 8128(b); 446 F.3d at 160-161. Because this latter provision restricts federal jurisdiction over otherwise proper claims under the FTCA, it should be read to mean no more than it says, i.e., that it applies only where the employee has sought and secured final "action" from the Secretary "allowing or denying" payment for emotional distress. The same reason--prior action by the Secretary--controlled the outcome for one of the two plaintiffs in *Bennett v. Barnett*, 210 F.3d 272 (5th Cir. 2000), *cert. denied*, 531 U.S. 875 (2000), where, unlike here, the emotional distress claims were mingled with claims for physical harm, including battery. *Id.* at 274, 276-277. In the same case, the Fifth Circuit noted that "[f]ederal courts are divided" on the substantive question of FECA

and lower courts continue to note that the question remains unsettled. *See, e.g., Briscoe v. Potter*, 355 F.Supp.2d 30, 42 n.10 (D.D.C. 2004); *Walker v. U.S. Postal Service*, 2003 WL 21418351 at *2 (N.D. Ill. June 19, 2003).

Accordingly, the same federal statute is being applied differently among the federal Courts of Appeals, resulting in different treatment of similarly situated plaintiffs. This Court is thus urged to settle the matter and decide whether emotional distress without any physical injury is within the scope of the FECA. This "is a question which must be answered by the federal courts, because it is one of jurisdiction." *Moe v. United States*, 326 F.3d 1065, 1068, *cert. denied* 540 U.S. 877 (9th Cir. 2003); *Figueroa v. United States*, 7 F.3d 1405, 1407-1408 (9th Cir. 1993), *cert. denied* 511 U.S. 1030 (1994); *Sheehan v. United States*, 896 F.2d 1168, 1173-1174, *amended in* 917 F.2d 424 (9th Cir. 1990).

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coverage for emotional distress and did not itself reach the question. *Id.* In *McDaniel v. United States*, 970 F.2d 194, 197 (6th Cir. 1992), the Sixth Circuit believed itself to be controlled by § 8128(b) even though the Secretary had taken no final "action allowing or denying" payment for the plaintiff's emotional distress but had merely "taken the view that the claim was cognizable under FECA." *Id.* at 197. Like the Fifth Circuit, the Sixth Circuit has never decided the substantive question of coverage, nor has it ruled that it lacks jurisdiction to do so in all circumstances. Most recently, the Sixth Circuit simply remarked that it "need not decide in this case . . . exactly when FECA encompasses causes of action predicated entirely upon nonphysical injury," because the plaintiffs had been shot. *Saltsman v. United States*, 104 F.3d 787, 790 (6th Cir. 1997).

II. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THIS COURT REQUIRING A STATUTORY DEFINITION SUCH AS "INJURY," WHEN UNCHANGED BY CONGRESS SINCE FIRST ENACTED, TO BE CONSTRUED BY ITS ORIGINAL MEANING.

In this case the First Circuit ruled that it is "uncertain" whether Congress intended emotional distress without physical injury to be a compensable "injury" under the FECA. As a result, it held, federal courts lack subject matter jurisdiction to decide the question. App. 8a-10a; contrast, *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993), *cert. denied* 511 U.S. 1030 (1994) (such claims are "not colorable under FECA as a matter of law").

Proper interpretation of the FECA under this Court's jurisprudence, however, results in no uncertainty on this question.

The definition of "injury" to the person under the FECA should be construed according to its original meaning in 1924. At that time there was no compensable common law injury for stand-alone emotional distress, and Congress has not changed that definition from 1924 to the present. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781-783 and n.12 (2000) (where Congress did not change the definition of "person" between 1863 and the present, the 1863 meaning controls).

When Congress first enacted the FECA in 1916, it provided compensation "for the *disability or death* of an employee resulting from a *personal injury* sustained while in the performance of his duty . . .," emphases added, and included no other definition of "injury." Act of Sept. 16,

1916, ch. 458, §§ 1, 40; 39 Stat. 742, 750, App. 13a-15a. At that time, the common law did not permit compensation for emotional distress which was unrelated to physical injury. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 12, p. 55 (5th ed. 1984). See, e.g., *Lynch v. Knight*, 9 H.L.C. 577, 598, 11 Eng. Rep. 854 (1861) ("Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone"), cited in Prosser, *supra*.

In 1924, Congress added a definition of personal "injury": "The term 'injury' includes, in addition to injury by accident, any disease proximately caused by the employment." Act of June 5, 1924, ch. 261, § 2, 43 Stat. 389; App. 16a-17a. This definition suggests no departure from the black letter law at the time, which continued to bar damages for emotional distress when unrelated to physical injury. C. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 88 (1935) ("*One who sustains bodily injury* may recover damages for . . . serious mental suffering accompanying such injury or produced thereby. . . .") (emphasis added).

In 1974, while retaining the 1924 definition of personal "injury," Congress expanded the definition to include a property damage component: "damage to or destruction of medical braces, artificial limbs, and other prosthetic devices." Act of Sept. 7, 1974, Pub.L. No. 93-416, § 1(d), 88 Stat. 1143; S. Rep. No. 93-1081, reprinted in 1974 U.S.C.C.A.N. 5341, 5345-5346; App. 17a-21a. This amendment, underscoring the physical nature of "injury" under the FECA, was viewed as necessary because "under existing law no compensation is generally paid with respect to loss of personal property due to accident regardless of the fact that the same accident resulted in personal injury." 1974 U.S.C.C.A.N. at 5345; App. 20a-21a.

As with property damage, no compensation generally was recognized under 1974 "existing law" for emotional distress without physical injury; in contrast with property damage, however, Congress did not then or thereafter amend the FECA's definition of "injury" to include stand-alone emotional distress. Other than the addition of a property damage component, the FECA definition of "injury" has remained the same since 1924, even though in recent years the common law has evolved to recognize claims for emotional distress without physical injury. PROSSER AND KEETON, *supra*.

Based on this history, it is readily apparent (and not "uncertain" as the First Circuit held) that the FECA does not compensate claims for emotional distress without physical injury. Under the historical analysis mandated by this Court's precedent, the unchanged definition of personal "injury" in 1924, which excluded such claims, controls today.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 06-1711

[Filed December 1, 2006]

STEPHEN GILL; MICHELLE GILL, Plaintiffs, Appellants,	)
v.	)
UNITED STATES OF AMERICA, Defendant, Appellee.	)

OPINION

LYNCH, Circuit Judge. This case involves an effort to evade the presentment and exclusive jurisdiction provisions of the Federal Employees Compensation Act (FECA), 5 U.S.C. §§ 8121, 8128, and bring suit directly in federal court under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. Adhering to this court's earlier decision in *Bruni v. United States,* 964 F.2d 76 (1st Cir. 1992), we affirm the district court's dismissal of the FTCA claims.

I.

In 2002, Stephen Gill, an attorney, moved his family to Florida to work for the United States Navy as a civilian attorney-advisor for what he understood would be a two-year period. Instead, he was given a series of short-term jobs and extensions, starting only forty-five days into the job. The job ended in January 2003, less than a year after it began. Gill and his wife in February 2004 filed claims under the FTCA with the Navy, alleging that they had suffered emotional distress but no physical injuries. The Navy responded that Gill needed instead to file a claim with the Secretary of Labor under the federal workers' compensation act, FECA. He refused to do so[1] and, after the six-month FTCA waiting period, the Gills brought suit in district court for negligent and intentional infliction of emotional distress and loss of consortium, service, and marital society, seeking over $1 million in damages.

Relying on our decision in *Bruni*, the district court dismissed the action. On appeal, the Gills make two arguments attempting to distinguish *Bruni*. First, they argue that Gill was an independent contractor and not a federal employee for FECA purposes, and that this issue of status is for the court to determine. Their second argument is that the FTCA is the appropriate vehicle for claims for emotional distress damages absent physical injuries. We reject both arguments.

---

[1] The record indicates that Gill failed to file a FECA claim within the three-year period provided by 5 U.S.C. § 8122(a).

II.

We review de novo the district court's ultimate legal conclusion on a motion to dismiss for lack of jurisdiction. *Valentin v. Hosp. Bella Vista,* 254 F.3d 358, 365 (1st Cir. 2001). We review for clear error the district court's findings of fact and its conclusions regarding mixed questions of law and fact. *Id.*

FECA is a federal workers' compensation scheme designed to provide redress for work-related injuries. The Act provides that "[t]he United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[2] 5 U.S.C. § 8102(a).

Liability under FECA is "exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages." *Id.* § 8116(c). The Act specifically excludes liability "under a Federal tort liability statute." *Id.* As the Supreme Court has explained:

> FECA's exclusive liability provision . . . was designed to protect the Government from suits under statutes, such as the Federal Tort Claims Act, that had been enacted to waive the Government's sovereign

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[2] There are exceptions to coverage if the injury or death is "(1) caused by willful misconduct of the employee; (2) caused by the employee's intention to bring about the injury or death of himself or of another; or (3) proximately caused by the intoxication of the injured employee." 5 U.S.C. § 8102(a).

> immunity. In enacting this provision, Congress adopted the principal compromise -- the "quid pro quo" -- commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-94, 103 S. Ct. 1033, 74 L. Ed. 2d 911 (1983).

Most importantly, the Act provides that "[t]he Secretary of Labor shall administer, and decide all questions *arising under*, [FECA]." 5 U.S.C. § 8145 (emphasis added). Further, the Act states that

> [t]he action of the Secretary or his designee in allowing or denying a payment under this subchapter is --
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Id. § 8128(b) (emphasis added). "FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage." *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 90, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991) (quoting *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 780, 105 S. Ct. 1620, 84 L. Ed. 2d 674 & n.13, 470 U.S. 768, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985)).

Accordingly, in *Bruni* this court held that a federal employee who brings tort claims against the United States "must first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under [FECA]." 964 F.2d at 79. We held that "[a] substantial question exists unless it is certain that the Secretary would not find coverage." *Id.* We also stated that "[i]n determining . . . whether there is a substantial question of compensability under FECA, we must consider the totality of the circumstances." *Id.*

The Gills argue that *Bruni* is not concerned with either the question whether a plaintiff is a federal employee or the question whether a particular type of injury is compensable under FECA, and that these are questions for the courts, not the Secretary of Labor, to decide.[3]

In *Bruni*, there was no dispute whether the injured party had been a federal employee or an independent contractor; rather, the question was whether the injury was sustained

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[3] The Gills argue that employment status is not a jurisdictional requirement for FTCA claims, and thus the district court should have resolved this issue in their favor under Rule 12(b)(6). This argument has no merit. Gill's status as either a federal employee or an independent contractor is pertinent to whether it is certain the Secretary would find coverage under FECA. This, in turn, relates to whether or not the district court had subject matter jurisdiction over the Gills' FTCA claims. The government's motion to dismiss was properly considered under Rule 12(b)(1). *See Muniz-Rivera v. United States*, 326 F.3d 8, 11 (1st Cir. 2003); *see also Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002) ("When a court is confronted with motions to dismiss under both Rules 12(b)(1) and 12(b)(6), it ordinarily ought to decide the former before broaching the latter.").

while in the performance of the job. Id. Similarly, there was no issue in *Bruni* as to whether emotional distress claims are covered by FECA. Id. But these distinctions between *Bruni* and the instant case do not make any difference to the jurisdictional inquiry. The nature of the coverage determination made by the Secretary does not matter. The test when the injured party fails to seek relief under FECA is the same: whether "it is certain that the Secretary would not find coverage." *Id.*

With respect to their emotional distress argument, the Gills rely on *Sheehan v. United States*, 896 F.2d 1168 (9th Cir.), modified on other grounds, 917 F.2d 424 (9th Cir. 1990), to support a distinction between questions concerning "coverage in and of itself"[4] and questions concerning FECA's "scope of coverage." *Id.* at 1174. The Gills argue that whether a claim is within the scope of FECA is a question that must be answered by federal courts, because it is one of jurisdiction. The Gills suggest that scope of coverage questions must be answered by federal courts regardless of whether there is a substantial question of FECA coverage.

First, *Sheehan* is inapposite. In *Sheehan*, the Secretary of Labor had already concluded that Sheehan's non-physical injuries were covered by FECA.[5] *Id. at 1173.* That case,

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[4] The Ninth Circuit noted that questions concerning "coverage in and of itself" address issues such as whether an injury occurred while an employee was at work and whether an injury occurred while plaintiff was an employee. *Sheehan*, 917 F.2d at 424.

[5] The Ninth Circuit nonetheless ruled that the Act authorizes compensation only for physical harm, and not for "emotional distress . . . divorced from any claim of physical harm." *Sheehan*, 896 F.2d at 1174. The court stated that because Sheehan's type of

unlike this one, did not concern whether a claim must be presented first to the Secretary.

Second, even if *Sheehan* stood for the proposition that a court, instead of the Secretary of Labor, may make an initial determination of uncertain coverage questions, we would reject *Sheehan*. That reasoning is inconsistent with both *Bruni* and the statutory assignment of these questions to the Secretary. *Bruni* did not parse different types of coverage questions for the Secretary, and its logic prohibits such parsing. Federal courts have subject matter jurisdiction over federal tort claims only when "it is certain that the Secretary would not find coverage [under the Act]." *Bruni*, 964 F.2d at 79. Further, the Ninth Circuit appears to have rejected the Gills' reading of *Sheehan*. In a later case, the court confined Sheehan to cases where the plaintiff's claim "was not colorable under FECA as a matter of law." *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993).

Bruni accords with the rule in other circuits. Every circuit addressing the issue has held that federal courts lack jurisdiction to decide uncertain questions of FECA coverage. Those questions are left to the Secretary. *See Tippetts v. United States*, 308 F.3d 1091, 1094 (10th Cir. 2002) (holding that where there is a substantial question of coverage, the district court lacks jurisdiction pending a determination by the Secretary); *Noble v. United States*, 216 F.3d 1229, 1235 (11th Cir. 2000) (noting that FTCA action cannot be considered when there is a substantial question as

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claim was not within FECA's scope of coverage, FECA was not her exclusive remedy, and the district court should not have dismissed Sheehan's FTCA claim for negligent infliction of emotional distress. *Id.* at 1173-74.

to FECA coverage); *White v. United States*, 143 F.3d 232, 234 (5th Cir. 1998) ("Only if we are certain that the Secretary of Labor would conclude that the employee's injuries do not present a substantial question of coverage under FECA may we entertain the employee's FTCA claim without the employee first submitting the claim to the Secretary of Labor."); *Figueroa*, 7 F.3d at 1408 (stating that *Sheehan* did not alter "the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary"); *Heilman v. United States*, 731 F.2d 1104, 1110 (3d Cir. 1984) (stating that "where there is a 'substantial question' regarding FECA coverage, the federal courts will not entertain a claim"); *Wallace v. United States*, 669 F.2d 947, 951-52 (4th Cir. 1982) (adopting a rule that FTCA action cannot be filed unless plaintiff's injuries are "'clearly not compensable' under FECA").

On the record in this case, it is not certain that the Secretary would find that Gill was not a federal employee but was an independent contractor.[6] Second, it is not certain that the Secretary would deny Gill's claim for emotional distress damages on the ground that such damages are unavailable under FECA.[7]

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[6] Plaintiffs did not argue that Gill was an independent contractor before the district court, but make this argument on appeal. The argument is waived, *see Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995), and, in any event, must first be presented to the Secretary of Labor.

[7] To the extent Ninth Circuit law may state that claims of emotional distress unaccompanied by physical injury do not present a substantial question of compensability under FECA, *see Moe v. United States*, 326 F.3d 1065, 1068 & n.11 (9th Cir. 2003); *Figueroa*, 7 F.3d at 1408; *Sheehan*, 896 F.2d at 1174, we note that

The United States submitted a declaration and memorandum of the Deputy Director for Federal Employees' Compensation, who had responsibility for administering FECA, stating that he had reviewed the Gills' complaint and had concluded, assuming that all factual statements in the complaint were true, that there was "a significant possibility of coverage under the FECA for an emotional condition sustained by . . . Gill allegedly related to actions of the Department of the Navy . . . with respect to his position . . . during the period February 2002 through January 2003." The Deputy Director cited numerous decisions by the Employees' Compensation Appeals Board to explain how he arrived at his conclusion.

On the second point, the federal courts do not have FTCA jurisdiction over plaintiffs' emotional distress claims because it is not certain the Secretary would find that FECA denies coverage for such claims. Indeed, the Gills concede that the Secretary of Labor has construed FECA to encompass work-related emotional distress, without regard to physical injury. *See, e.g., In re Harris*, 42 Empl. Comp. App. Bd. 923, 928 (1991); In re Cutler, 28 Empl. Comp. App. Bd. 125, 129-30 (1976); *see also Spinelli v. Goss*, 371 U.S. App. D.C. 20, 446 F.3d 159, 160-61 (D.C. Cir. 2006) (stating that the Secretary's decision that FECA covered plaintiff's emotional and psychological injuries "settles the matter," and holding that dismissal was appropriate); *Bennett v. Barnett*, 210 F.3d 272, 277 (5th Cir. 2000) (noting that the Secretary took the position that plaintiff's emotional distress claim was covered by FECA, and holding that the district court did not have jurisdiction to decide FTCA claim for the same injury);

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this position is contrary to the great weight of authority discussed hereafter in this decision.

Farley v. United States, 162 F.3d 613, 616 (10th Cir. 1998) (concluding that there was a substantial question of compensability under FECA based on the recognition that the Secretary has in some instances found FECA coverage for emotional distress claims); *McDaniel v. United States*, 970 F.2d 194, 195, 197 (6th Cir. 1992) (acknowledging the Secretary's determination that FECA covered plaintiff's "disabling emotional condition," and affirming dismissal of FTCA action for lack of jurisdiction).

We *affirm* the district court's dismissal of plaintiffs' FTCA action for lack of subject matter jurisdiction. Costs are awarded to the United States.

ERRATA SHEET

The opinion of this Court issued on December 1, 2006 is amended as follows:

Page 3, line 9 [p.2a, line 27]: replace "emotional damages" with "emotional distress damages"

Page 6, line 6 [p.6a, line 9]: remove the space and add the "at 79." after "*Id.*"

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

A.A. No. 05-10309-MLW

[Filed January 9, 2006]

STEPHEN GILL, ET AL.,	)
Plaintiffs,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant.	)
	)

MEMORANDUM AND ORDER

WOLF, D.J.

The government has moved to dismiss or stay this case pending a determination by the Secretary of Labor concerning whether plaintiffs are entitled to compensation for the matters at issue in this case under the Federal Employees Compensation Act, 5 U.S.C. § 8101 *et seq.* (the "FECA"). Alternatively, the government requests that this case be transferred to an appropriate District in Florida. Plaintiffs oppose the government's motion.

If a claim is covered under the FECA, the federal courts do not have subject matter jurisdiction over it. *See Bruni v. United States*, 964 F.2d 76, 79 (1st Cir. 1992).

Resolution of the coverage question has been entrusted to the Secretary of Labor. 5 U.S.C. § 8128(b). Thus, the employee must first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under the act. *Somma v. United States*, 283 F.2d 149, 150-51 (3rd Cir. 1960). A substantial question exists unless it is *certain* that the Secretary would not find coverage.

Id. (emphasis in original).

The government's submission indicates that it is not, as a matter of fact or law, certain that plaintiffs claims are not covered by the FECA. Indeed, it appears that there is a significant possibility that their claims are covered by the FECA.

Accordingly, it is hereby ORDERED that:

1. The United States' Motion to Dismiss or in the Alternative For a Stay (Docket No. 7) is ALLOWED.

2. This case is DISMISSED without prejudice to being reinstituted if the Secretary of Labor decides that the FECA does not cover the plaintiffs' claims.

/S/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

APPENDIX C

LEGISLATIVE HISTORY

THE
STATUTES AT LARGE
of the
UNITED STATES OF AMERICA
from
DECEMBER, 1915, to MARCH, 1917

CONCURRENT RESOLUTIONS OF THE TWO
HOUSES OF CONGRESS
and
RECENT TREATIES, CONVENTIONS, AND
EXECUTIVE PROCLAMATIONS

Edited, Printed, and Published by Authority of Congress
Under the Direction of the Secretary of State

VOL. XXXIX
IN TWO PARTS

PART 1 - Public Acts and Resolutions
PART 2 - Private Acts and Resolutions, Concurrent
Resolutions, Treaties, and Proclamations

PART 1

SIXTY-FOURTH CONGRESS.
Sess. I. Chs. 456-458. 1916, p.742

CHAP. 458. - An Act To provide compensations for employees of the United States suffering injuries while in the performance of their duties, and for other purposes.

[September 7, 1916. [H.R. 15316.] [Public, No. 267]]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

[Government employees. Compensation
for injuries in service.
Exceptions.]

* * *

p.750

SEC. 40. That wherever used in this Act -

The singular includes the plural and the masculine includes the feminine.

The term "employee" includes all civil employees of the United States and of the Panama Railroad Company.

The term "commission" shall be taken to refer to the United States Employees' Compensation Commission provided for in section twenty-eight.

The term "physician" includes surgeons.

The term "monthly pay" shall be taken to refer to the monthly pay at the time of the injury.

[Construction of terms used.]

* * *

THE
STATUTES AT LARGE
of the
UNITED STATES OF AMERICA
from
DECEMBER, 1923, TO MARCH, 1925

CONCURRENT RESOLUTIONS OF THE TWO
HOUSES OF CONGRESS
AND RECENT TREATIES, CONVENTIONS, AND
EXECUTIVE PROCLAMATIONS

Edited, Printed and Published by Authority of Congress
Under the Direction of the Secretary of State

VOL. XLIII
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Part 1 - Public Acts and Resolutions
Part 2 - Private Acts and Resolutions, Concurrent
Resolutions, Treaties and Proclamations

PART I

SIXTY-EIGHTH CONGRESS.
Sess. I. Chs. 261, 262. 1924

p.389

CHAP. 261. - An Act To amend an Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916.

[June 6, 1924 [H.R. 7041] [Public No. 196.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, be amended as follows:

[June 5, 1924 [H.R. 7041.] [Public No. 196.] Injuries to Government employees. Compensations for.]

. . .

SEC. 2. That section 40 of said Act is amended to read as follows:

"SEC. 40. That wherever used in this Act-

"The singular includes the plural and the masculine includes the feminine.

"The term 'employee' includes all civil employees of the United States and of the Panama Railroad Company.

"The term 'commission' shall be taken to refer to the United States Employees' Compensation Commission provided for in section 28.

"The term 'physician' includes surgeons.

"The term 'monthly pay' shall be taken to refer to the monthly pay at the time of the injury.

"The term 'injury' includes, in addition to injury by accident, any disease proximately caused by the employment.

"The term 'compensation' includes the money allowance payable to an employee or his dependents and any other benefits paid for out of the compensation fund: *Provided, however*, That this shall not in any way reduce the amount of the monthly compensation payable in case of disability or death."

Approved, June 5, 1924

[Vol. 39, p. 750 amended. Construction of terms used. Vol. 39, p. 748. "Injury," includes diseases. "Compensation." *Proviso*. Reductions restricted.]

* * *

COMPENSATION FOR WORK INJURIES
Sept. 7, 1974, P.L. 93-416
p.1307

For Legislative History of Acts, see. p. 5341

PUBLIC LAW 93-416; 88 STAT. 1143

[H.R. 13871]

An Act to amend chapter 81 of subpart G of title 5, United States Code, relating to compensation for work injuries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

. . .

(d) Section 8101(5) of the Act[40] is amended by inserting before the semicolon ", and damage to or destruction of medical braces, artificial limbs, and other prosthetic devices which shall be replaced or repaired, and such time lost while such device or appliance is being replaced or repaired; except that eyeglasses and hearing aids would not be replaced, repaired, or otherwise compensated for, unless the damages or destruction is incident to a personal injury requiring medical services".

* * *

COMPENSATION FOR WORK INJURIES
P.L. 93-416

COMPENSATION FOR WORK INJURIES
P.L. 93-416, see page 1307

House Report (Education and Labor Committee) No. 93-1025
May 2, 1974 [To accompany H.R. 13871]
Senate Report (Labor and Public Welfare Committee) No. 93-1081
Aug. 8, 1974 [To accompany H.R. 13871]
Cong. Record Vol. 120 (1974)

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[40] 5 U.S.C.A. § 8105(5)

DATES OF CONSIDERATION AND PASSAGE
House May 7, August 19, 1974
Senate August 12, 1974
The Senate Report is set out.

SENATE REPORT NO. 93-1081

p.5341

THE Committee on Labor and Public Welfare, to which was referred the bill (H.R. 13871), to amend chapter 81 of subpart G of title 5, United States Code, relating to compensation for work injuries and for other purposes, having considered the same reports favorably thereon with amendments and recommends that the bill do pass.

INTRODUCTION AND BACKGROUND

Almost fifty-eight years ago, the Congress recognized the need for compensating Federal employees who become injured or disabled in the course of their employment. In 1916, the Federal Employees' Compensation Act (FECA) was born, and a system was established to provide for the delivery of disability benefits.

The FECA was last amended in 1966. Since that time, there has been a growing awareness and interest in the field of workers' compensation generally. Such attention is welcomed, but is long overdue.

As a result of a requirement contained in the Occupational Safety and Health Act of 1970 (Public Law 91-596), a study was commissioned to review the adequacy of existing provisions of the various State workers' compensation programs. When the comprehensive findings of the National

Commission on State Workmen's Compensation Laws were released in July 1972, the public was made aware of the many inequities and inadequacies which the existing systems had been allowed to foster. Although the National Commission focused its attention on State systems, many of its recommendations were found inapplicable to deficiencies in the program administered for Federal Employees, and have been incorporated into this bill.

It is essential that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner. The Federal Government should strive to attain the position of being a model employer. Enactment of these amendments will do much to achieve that goal.

* * *

EXPLANATION OF MAJOR PROVISIONS

* * *

p.5345

Compensation for damaged prosthetic devices

Under existing law no compensation is generally paid with respect to loss of personal property due to accident regardless of the fact that the same accident resulted in personal injury. Non-reimbursable personal property has included such items as artificial limbs and other prosthetic devices. The bill in Section I would amend the definition of the term "injury" to include damage to or destruction of medical braces, artificial limbs, and other prosthetic devices. It will require the government to compensate injured employees for work-

related damage to artificial appliances or prosthetic devices. It is the Committee's intention that the employee suffering such damage be compensated for any time lost while such device or appliance is being replaced or repaired. A prosthetic device would be considered a part of the body for all intents and purposes of this Act, and the Secretary would be required to reimburse an employee for the loss or damage to such device if caused by an employment-related accident or series of incidents. However, damaged eyeglasses and hearing aid would be replaced or repaired only if the damage were related to a personal injury requiring medical services (although such personal injury need not necessarily be related to an injury of the eye or ear).

It is envisioned that a report from an appropriately qualified physician or prosthetic repair technician will be necessary to support any such period of wage loss, and that all appropriate temporary disability provisions of the Act would apply in the same fashion as if the loss/damage occurred to that part of the body which the prosthetic device replaced. The schedule award provisions of the Act would not apply.

* * * *